No. 234.

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JAMES H. McKENNEY,
Clerk

Brf. of Rives & Sterling for D. E.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1901.

Filed Apr. 15, 1902.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY AND ANOTHER,

Plaintiffs-in-Error.

against

THE CITY OF NEW YORK,

Defendant-in-Error.

BRIEF FOR DEFENDANT-IN-ERROR.

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Supreme Court of the United States.

OCTOBER TERM, 1901.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY AND THE NEW YORK AND HARLEM RAILROAD COMPANY, Plaintiffs in Error, *against* THE CITY OF NEW YORK, Defendant in Error.	No. 234.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

Statement and Points in behalf of the City of New York by its Corporation Counsel:

In this case it is sought to review in the Supreme Court of the United States, through a writ of error, a decision of the Supreme Court of the State of New York which was affirmed by its Court of Appeals.

The controversy arises in neither a suit at law nor in an action in equity, but in what is called in the statutes of the State of New York a Special Proceed-

ing. And furthermore, it does not arise in one of the ordinary special proceedings, as, for instance, where it is sought to obtain a writ of *mandamus* or a writ of *certiorari* or a writ of *habeas corpus*, but in what we may term an extraordinary special proceeding.

This extraordinary special procedure exists by virtue of certain special statutes of the State of New York applicable to one locality only, to wit, that occupied by the City of New York.

These special local statutes allow or rather require the Supreme Court of that State to review in a summary manner and under certain restrictions and limitations certain classes of assessments for local improvements. The courts whose action it is sought to review here, while courts of general jurisdiction, act under these special local statutes and in this case, only as courts of limited jurisdiction.

The three courts of the State of New York before which this case has been argued have denied the motions made by the plaintiffs in error who were moving parties or petitioners before those courts.

It seems advisable to state the facts somewhat in detail, which we do in the following terms:

The plaintiffs in error are railroad corporations operating a steam railroad in certain parts of the City of New York. The New York and Harlem Railroad Company is the owner of certain lands, franchises and privileges in that city, and the New York Central and and Hudson River Railroad is the lessee of the same, and these two companies have certain contract relations with each other. It is, however, unnecessary to distinguish between them for the purposes of this litigation and we shall therefore speak of them as the Railroad Companies.

A part of these lands consists of a strip of land about four rods wide over which the tracks of the railroad companies are laid and on which numerous trains pass in and out of New York City.

These tracks run in a depressed cut below the natural surface of the ground. This land is owned by the Harlem Railroad Company in fee, having been acquired by purchase from Gouverneur Morris in 1842. The deed therefor was offered in evidence, as appears from page 12 of the record, and from Exhibit 1 at page 24 thereof. The deed is not printed in the record but is apparently an ordinary conveyance without special covenants or conditions.

Another part of these lands is an irregular tract of unimproved property not used for railroad purposes, nor in fact for any purpose at present, and is like any other unimproved land in the vicinity. This land was conveyed to the railroad company by four deeds offered in evidence, as appears at pages 12 and 13 of the record, and which are called Exhibits 2, 3, 4 and 5, at pages 24 and 25 thereof.

All of these deeds are apparently without special covenants, except the one called Exhibit 2, which conveys one parcel and has a covenant as follows:

That the said parcel "shall be used solely and only for the purposes of a railroad and station-house to be thereon erected, and also that no ardent or intoxicating drinks shall be manufactured or bought or sold on the premises to be used as a beverage, and that no dwelling house shall be erected on the said premises of less value than $500, and in case the said conditions are not faithfully performed and kept the estate and the said premises of the grantees or their legal representatives or assigns, or any of them, shall cease and determine and the said premises shall

immediately revert to the grantors, their heirs or assigns, the said premises being also conveyed, subject to all the conditions of fencing contained in the deed from Gouverneur Morris to the parties of the first part hereto."

This clause is not quoted in full in the brief for the plaintiffs in error, and we therefore quote it here.

All of this land unless, possibly, the part as to which the said special covenant relates, could doubtless be sold or alienated by the railroad company and put to any uses to which real estate can be put at any time should the railroad companies so desire, and hence, although some parts of this land are now used for railroad tracks, it may well be in the future that it will cease to be used for those purposes and be sold in the open market like other real estate, and hence will derive the same benefit from local improvements as other land.

Along the side of this cut runs a public street or avenue, called sometimes Vanderbilt avenue and sometimes Park avenue.

In accordance with the laws of the State of New York the City of New York has constructed at its own expense certain improvements of this avenue; has paid for them and has imposed two assessments upon real estate in the vicinity deemed specially benefited by these improvements in order to reimburse itself for the said expenses.

One of these assessments was for the expense of regulating, grading, setting curb-stones, flagging and laying sidewalks in the said avenue, and the other was for the expense of paving the said avenue. Each of these assessments was confirmed on February 17, 1899.

The construction of the avenue, or, as it is called, the regulating and grading thereof, was done at a cost

to the City of New York of $12,236.27 (see p. 27 of the Record).

The paving of the avenue was done at an expense to the City of New York of $26,167.14 (see p. 31 of the Record). All of this expense was distributed over the various parcels of real estate in the vicinity deemed benefited by the improvements, and a part of the expense of each of the said improvements was assessed upon the said land of the railroad companies, to wit:

For regulating and grading.....	$4,687 82
For paving.....	12,542 03

As already stated, a part of the land of the railroad companies is occupied by the depressed cut in which the railroad tracks are laid, and another part is ordinary, vacant land, without buildings or any other structure, lying west of the railroad tracks and entirely unused for any purpose at the present time.

These two parts, however, are assessed together, that is to say, the cut where the railroad track is and also the said large tract, between Wendover avenue and One Hundred and Seventy-third street, west of the cut, are assessed for each improvement under five numbers, but as one parcel, and in one amount in each case, so that it is impossible to tell at the present time at what amount the different subdivisions of the said lands are assessed (see the part colored green on the map reproduced, between pages 10 and 11 of the Record and the assessment on pages 30 and 34).

There is nothing, therefore, in the case to show what amount was assessed upon the land on which are the railroad tracks and what amount upon the other unimproved land.

The process of constructing improvements of this character and levying assessments therefor, may be described as follows:

The first step is the adoption of a resolution by the local legislative body called the Common Council authorizing the improvement, and the doing thereof, at the public expense and the laying of an assessment therefor.

The second step is the making of a contract by the City with a contractor for the construction of the improvement.

The third step is the ascertainment of the cost upon the completion of the work, which cost is embodied in certificates to the Board of Assessors, which determine the amount to be assessed.

The fourth step is the action of the Board of Assessors.

The assessors are local taxing officers of the City appointed by the Mayor for the purpose of "making all assessments other than those required by law to be confirmed by a court of record for local improvements for which assessments may be legally imposed" (see section 943 printed in full in the appendix).

The assessors were five in number when these improvements were before them.

The sixth step is the action of the Board of Revision of Assessments. That Board consisted of the Comptroller, the Corporation Counsel and the President of the Board of Public Improvements, and is in the nature of an appellate tribunal upon decisions of the Board of Assessors (see section 944 printed in full in the appendix).

It has power to consider on the merits all objections made to any such assessment and to subpœna and examine witnesses in relation thereto, and to confirm the assessment or to refer the same back to the Board of Assessors for revisal and correction in such respects as it may determine. All such assessments immediately upon confirmation must be transmitted to the Comptroller for entry and collection.

The course described above was followed as to each of the assessments now before the Court, and they were each confirmed by the Board of Revision, February 17, 1893, and thereupon became charges against the railroad companies, collectible in the usual course if they were legal.

It may be observed here that the railroad companies object to nothing previous to the action of the Assessors. They do not deny that the improvements were duly authorized by the Common Council, nor that they were constructed by contract with the City, nor that the cost was paid by the City, nor that they were constructed in a careful, proper and economical manner, nor do they deny that improvements of this character should under the law be paid for through assessment of property in the vicinity deemed benefited by the improvement, nor in fact that there was anything illegal in the action of the City or of the contractors in making the improvements.

It is important to see just what the railroad companies did object to, as disclosed by the record.

Their first act in opposition to the proposed assessment was to object and protest against the same when is was before the Board of Assessors (see Exhibit 15, at page 35 of the Record).

The material part of their objection was as follows:

"That it is unfair, unequal, inequitable and un-

just and is assessed more than the surrounding property. The property assessed extends beyond the entire western line of the improvement for 4,105 feet and is 66 feet wide. Upon the opposite or westerly side of the property assessed, which is held by the New York and Harlem Railroad Company as owner, and is in the possession of and is used and occupied by the New York Central and Hudson River Railroad Company, as lessee, for the purpose of its incorporation, is Vanderbilt Avenue, West, a public street and thoroughfare, and the property, therefore, is liable to an assessment for improvement for Vanderbilt Avenue, West. It is, therefore, not to be considered as full lot property although the assessment against it is made upon that basis. By virtue of the above premises, it is respectfully submitted that the foregoing assessment should be materially reduced."

The above objection was as to the regulating and grading assessment.

The objection before the Board of Assessors as to the paving assessment was similar (see Exhibit 16, at page 36 of the record). The prayer for relief only, being slightly different, to wit.: That the assessment "should be entirely vacated or materially reduced."

The two proposed assessments with the said objections were transmitted by the Assessors to the Board of Revision (see Exhibits 17 and 18, at page 37 of the record). The latter Board, however, confirmed the assessments (see pages 31 and 35 of the record).

It is thus to be observed that neither before the Board of Assessors nor before the Board of Revision did the railroad companies even claim that they were not liable to be assessed because they were not benefited. Their specific objection has just been quoted

above. They claim that the "assessment is unfair, unequal, inequitable and unjust, and (their land) is assessed more than the surrounding property," and that it was liable to assessment for other improvements in the neighborhood, and not as full-lot property.

This brings us down to the period succeeding the confirmation of the assessment when the amount of the charge or claim by the City against the railroad companies had become fixed.

The railroad companies then appealed to the Court. They adopted the form of procedure prescribed by the New York Statutes (*i. e.*, the Greater New York Charter), which was then Laws of 1897, chapter 358, which is printed as the third volume of the Session Laws of that year.

[See particularly sections 958 to 964 thereof, called Title 3 of chapter XVII. These statutes are printed so far as material in the appendix.]

This procedure is briefly as follows (section 959):

If in the proceedings relative to an assessment for a local improvement, any fraud or substantial error shall be alleged to have been committed, the party aggrieved may apply to a Justice of the Supreme Court in Special Term or vacation who shall thereupon, upon due notice to the Corporation Counsel, proceed forthwith to hear the proofs and allegations of the parties. The Justice is authorized after the hearing to make such order as may be allowed under the statutes; that is, an order reducing or refusing to reduce the assessment, and perhaps in some cases vacating the same.

The railroad companies elected to proceed under the said statutes and filed a petition thereunder which is printed at page 8 of the record. The material part thereof is as follows:

"XII.—And your petitioners further show that

the improvements for which the said assessments have been made, laid or imposed are local improvements, and that in the said proceedings under which the said assessments have been made, laid or imposed substantial errors have been committed, among which are the following:

First—That the said lands owned, occupied and used by your petitioners as aforesaid and upon which said assessments have been made, laid or imposed are not houses and lots within the meaning of the said ordinances and statutes, and that the said lands owned, occupied and used by your petitioners, as aforesaid, have not been, will not be, and cannot be, benefited in any manner by the said improvements.

Second—That there was and is no authority of law for the assessment upon the said lands owned, occupied and used by your petitioners as aforesaid, and upon which said assessments have been made, laid or imposed for the total cost or any part of the cost of the said improvements.

Third—That the cost and expense of the said work in making said improvements have not been distributed equally or in proportion to the benefit upon the houses and lots fronting upon said Vanderbilt avenue, East, and upon all the houses and lots benefited thereby and assessable therefor.

Wherefore, your petitioners pray that the said assessments be vacated and that the lien or liens created thereby, or by any subsequent proceedings cease, so far as the said assessments affect the said lands owned, occupied and used by your petitioners as aforesaid, and that the Collector of Assessments and Arrears, the Clerk of Arrears,

the Comptroller, and the Deputy Comptroller of the City of New York, be each directed to cancel and discharge said assessments and liens, or apparent liens, upon the records in their respective offices, so far as the same affect the said lands of your petitioners.

Dated, Borough of Manhattan, N. Y. City, March 16, 1899."

It will be seen from the above that the substance of the railroads claim before the State Courts was that their lands could not be legally assessed because they were not benefited.

This claim, it will be observed, was not raised before the assessors, and thus the railroad companies have changed their position.

Proceeding under the said statute and to support their petition certain testimony was taken, which is printed in the record between pages 12 and 24, and certain exhibits are also printed, to which it is not necessary to refer here further than to say that they merely tend to show that the assessments are legal.

The only testimony tending to show that the assessments were illegal is that of the two witnesses, Haviland and Van Etten. This testimony is important to the petitioner's case, and in fact that case depends upon their testimony, at least in one view of the subject.

The railroad companies attempted to show by these two witnesses that their land was not benefited by the improvements. These two men are employees of the road: Haviland as a civil engineer and Van Etten as general superintendent. They testified, in substance, that the improvements were of no benefit to the land of the railroad company.

It is, of course, fundamental to the case of the plaintiffs in error that the assessments should be shown to be illegal, and the only ground on which they are now claimed to be illegal by the railroad companies is that the improvements were of no benefit to the railroad companies or to their land. This, it must be admitted, is a question of fact on which there might be a difference of opinion. We do not believe that this Court would hold that as matter of law from the situation disclosed in this case the lands of the railroad companies could not be benefited by the improvements, and do so for the purpose of reversing the action of all the State Courts.

If, then, there is a question of fact as to whether the railroad companies' lands are benefited or not by the improvements then we have this situation. The five Assessors and the three members of the Board of Revision have held in the exercise of their official duties that the railroad companies' lands are benefited by the improvements to the extent of the assessment put upon them. Against their adjudication we have the testimony of two employees of the railroad company that the land is not benefited by the said improvements.

The chief function of the Board of Assessors and the Board of Revision is to determine the very question whether or not a particular piece of property has been benefited by a local improvement and if so to what amount. They are the local tribunals created to pass on that very question. A court of first instance would not, on general principles, interfere with their decisions upon a matter so peculiarly within their province, and an appellate court much less, except upon the clearest and most convincing evidence that there was no benefit.

We are thus brought to this position. There has arisen a question of fact which this Court, if it is to

annul the decisions of the State Courts, must decide in favor of the plaintiffs in error by reversing the judgment of the Assessors and the Board of Revision of Assessments, and the implied finding of the State Courts, and accept the testimony or rather the opinion of the two employees of the railroad.

The situation would then be that any assessment in the City of New York should be vacated, provided two witnesses, even agents or employees of the petitioner, can be got to swear that in their opinion the assessment does not benefit the property.

In the state of the evidence described as above, the case was brought to a hearing at a Special Term of the Supreme Court of the State of New York, the court of first instance, before Mr. Justice Truax, upon the said testimony and exhibits. He denied the motion for a vacation or reduction of the assessments and made an order to that effect which is printed at page 10 of the record. He wrote no opinion and the reasons for his decision do not appear further than from what can be gathered from the record.

The order, however, recites that the motion for the vacation or reduction of the assessments came on for a hearing before Mr. Justice Truax; that upon reading and filing the petition and notice and the testimony, and after hearing counsel on each side, he denied the motion or prayer of the petitioner with costs to the City of New York.

It seems fair to presume that he declined to disturb the finding of the Assessors and Board of Revision that the railroad companies were benefited to the amount of the assessment imposed upon them.

The railroad companies then appealed from the said order to the Appellate Division of the Supreme Court of the State of New York for the First Department.

The Appellate Court, however, affirmed the said order (see the order at page 39 of the record), and the elaborate opinion of that Court by Mr. Justice McLaughlin, may be found at page 40 of the record. The said opinion is also printed in the official reports as *Matter of the Petition of the New York Central and Hudson River Railroad Company*, 49 *App. Div.*, 281.

The following quotation from the opinion of the Appellate Division may be made:

> "The petitioners contended in the Court below, as they did upon this appeal, that their property upon which the assessments were levied is held and used solely for railroad purposes; that there are no buildings or improvements upon it except railroad structures; and that it is not and will not be benefited by the improvements and therefore the assessments are illegal. The conclusion at which we have arrived renders it unneccesary to determine whether the petitioners' property is or will be in fact benefited by the improvements, for if it be conceded that it will not, that does not in and of itself entitle them to have the assessments vacated."

The Court then proceeded to carefully analyze the statute authorizing this particular procedure, and held that in that form of procedure, and on the evidence submitted, the railroad companies were not entitled to an order of vacation or reduction. In doing this the Court simply construed a State statute of a special and local character and held that it did not entitle the petitioners to a vacation or reduction of the assessment on such a state of facts as appeared.

The railroad companies appealed from the order of the said Appellate Court to the Court of Appeals, which latter Court affirmed the decision of the Appellate Court (see mem. in 163 N. Y., 604), and remitted

the case to the Supreme Court of the Sta
York (see remittitur at page 1 of the record).

The railroad companies then secured a writ of error whereby the case comes before the Supreme Court of the United States.

It is evident from the statement of the case, which we have just made, that the record of what was done before the Assessors and the Board of Revision and before the State Courts does not disclose any Federal question whatever. Nor is there a word in the opinion to show that a question of Federal or State constitutional law was raised, or discussed, or decided. The gist of the complaint before the Assessors was, that the proposed assessments should be greatly reduced for certain technical reasons.

The claim and argument before the courts was that the railroad companies' land was not benefited and hence that the assessments should be vacated.

The Appellate Division and Court of Appeals, held that whether the said lands were benefited or not the Court could not, under the restrictions of the statutes applying to this form of procedure, vacate the assessments. They did not hold that the assessments were legal, nor issue any process upon their decision depriving the railroad companies of their lands, nor could they issue any such process under the law. They merely decided that the petitioners were not entitled under these statutes to a vacation of the assessment, and their motion for that relief in the form of procedure adopted should be denied. The petitioners are therefore left just where they were before, just where they would be if the whole law under which they proceeded were repealed, as it might legally be at any time by the State Legislature.

The railroad companies claimed that under a proper construction of these special statutes, the Court should vacate the assessments because the improvements did not benefit their property. The two Appellate Courts held that properly construed the statutes did not allow the Court to vacate or reduce the assessments and hence it was unnecessary to determine whether the property was benefited or not.

But the railroad companies now urge that another statute takes away the remedy by bill in equity to remove the assessment as a cloud upon title (see section 958 printed in full in the Appendix).

Suppose it does; we are not now before the Court in an action in equity to remove a cloud upon title. If the railroad companies had brought such an action in order to remove this assessment as a cloud upon title, and the State Courts had decided that such an action would not lie because forbidden by statute, and such a case came before this Court, a different issue would be presented.

It may be, for aught we know, that this Court would hold that a statute depriving a litigant of this remedy might result in depriving him of his property without due process of law. Whether it would or not is not material here, nor are we bound to uphold one or the other side of this question.

We are before this Court in a special statutory proceeding under State laws in which the highest Court of that State has held that a certain motion for relief should be denied. There is nothing to prevent the railroad companies from bringing now an action in equity to remove the assessment as a cloud upon title in which they may, if they choose, raise the question that the statute depriving them of this remedy is unconstitutional.

Let us now examine how the plaintiffs in error get before this court. They do so in this manner: They have secured a certificate from presiding Justice Van Brunt of the appellate Division of the Supreme Court of the First Department (see page 48 of the record) to the effect that certain statements or arguments therein set forth were contained among others in the printed brief presented and submitted by counsel for the railroad companies to the said Appellate Division on the argument before that court.

They have also obtained a similar certificate from Chief Judge Parker of the Court of Appeals. (See page 50 of the record.)

There is nothing in said statement or argument before the Appellate Division referring to the Federal Constitution. The claim is that statutes which take away all remedy from a person aggrieved are void and unconstitutional and also that assessments imposed for local improvements without regard to benefit are also void and unconstitutional. This is an argument of force in reference to the State Constitution as much as in reference to the Federal Constitution, and it would seem that it was intended to refer to the former. At any rate, not a word is written therein as to the Federal Constitution.

When we turn to the said statement or argument before the Court of Appeals almost the same thing may be said. The only reference to the Federal Constitution is at page 52, where it is stated that such a construction of a statute should be made as "will render it conformable to, rather than violative of, the rule of State and Federal Constitution."

The same two propositions are repeated with more elaboration in the argument before the Court of Appeals, which we have stated as the substance of the

argument before the Appellate Division, to wit: (1) Statutes taking away all remedy against illegal action are void and unconstitutional. (2) Assessments imposed for local improvements without regard to benefit are void and unconstitutional.

On this very slim foundation the railroad companies petitioned this Court for a writ of error (page 58 of record), on the ground that the validity of the State statute was drawn in question as depriving the petitioners of their property rights without due process of law, and the decision being in favor of its validity was repugnant to the Constitution of the United States.

The plaintiffs in error filed certain assignments of error (see page 54 of the record), which are to the effect merely that the decisions of the State courts are erroneous because the statutes of the State as construed by said courts and the authority exercised thereunder result in depriving the railroad companies of their property rights without due process of law, and hence are repugnant to the Constitution of the United States.

It is settled that a petition for a writ of error forms no part of the record upon which the Supreme Court acts (*Leeper* vs. *Texas*, 139 U. S., 462).

The only basis, therefore, for getting before this court at all is certain statements in the brief of the counsel for the railroad companies before the two appellate courts, which statements were not considered, so far as it appears from the record, by the said courts at all, nor were they passed upon by any of the State courts, nor was a decision on those points necessary to the conclusion arrived at by the said courts.

We have determined to present the argument for the defendant in error by (1) repeating substantially the

argument before the State Courts, and (2) by discussing such phases of the subject as it seems to us this Court might consider peculiarly within its province. This course will involve a reference to many matters of detail which this Court will doubtless not pass upon, but it will at least disclose the practical side of the matter. A certain amount of repetition will also result, but we believe the effect will be to make the subject clearer, and enable this court to more easily understand the true situation, which, on account of the technical character of the proceeding, it is not easy to make plain.

It is of vast importance to the City of New York that its system of law as to assessments for local improvements, which has been laboriously built up during a long series of years and at great expense, and after much legislation and litigation, should not be thrown into confusion by unsettling the basis of the system itself.

It will be readily seen, we hope, from our brief that the questions involved are of little importance to the railroad companies, who could not be compelled to pay the assessments if in fact they are illegal, nor could they be even embarrassed seriously by any action the City could take.

It would be a very disastrous thing for the City, however, if its system of dealing with assessments for local improvements should be held unconstitutional.

FIRST POINT.

Under this point we repeat substantially the argument that was made for the City of New York before the State Courts, and particularly before the Court of Appeals.

We make this argument under three subdivisions.

I.

THE RAILROAD COMPANIES HAVE BEEN DEPRIVED BY STATUTE OF ANY REMEDY IN THIS FORM OF PROCEDURE ON THE STATE OF FACTS DISCLOSED BY THE TESTIMONY, SO THAT THE ORDER APPEALED FROM IS CORRECT EVEN IF IT WERE CONCEDED THAT THE IMPROVEMENTS ARE OF NO BENEFIT TO THE SAID COMPANIES.

This has been settled in the State Courts by a long line of decisions, so that, for this reason alone, the order should be affirmed. Each of these assessments was confirmed in the year 1899, and, of course, since the Greater New York Charter went into effect. It has been decided, at Special Term, in at least four cases beside the present one, that have arisen since the Greater New York Charter went into effect, that the above statement of the law on this point is correct.

These cases are as follows:

Matter of *Zimri West*, decided by Mr. Justice Bischoff in December, 1898;

Matter of *Cornelius F. Kingsland*, decided by Mr. Justice Scott two or three months later;

Matter of *Frederick Brooks*, also decided by Mr. Justice Scott shortly afterward;

Matter of *David R. Jaques*, decided by Mr. Justice Andrews May 15, 1900.

The opinion of Judge Bischoff, which also involved other questions, is printed in the New York Law Journal of November 22, 1898, and that of Judge Andrews in said journal of May 16, 1900. In the other cases no opinions were written; and it is, perhaps, fair to say that the question seems to have been regarded in the *Kingsland* and *Brooks* cases as no longer an open one.

And, more important still, there is the decision of the Appellate Division in the case now before this Court (49 App. Div., 281).

The conclusion stated in the first subdivision of our first point is reached in the following way:

Section 962 of the Greater New York Charter, which alone is sufficient to sustain our contention, reads as follows:

"Sec. 962. No court shall vacate or reduce any assessment in fact or apparent, whether void or voidable, on any property for any local improvement otherwise than to reduce any such assessment to the extent that the same may be shown by parties complaining thereof to have been in fact increased in dollars and cents by reason of fraud or substantial error; and in no event shall that portion of any such assessment which is equivalent to the fair value or fair cost of any actual local improvement, with interest at the rate of three per centum per annum from the date of confirmation to the date of the final order of reduction, and seven per centum thereafter, be disturbed for any cause. The provision of this section shall apply to actions to recover money paid for assessments, and the amount recovered shall be limited to the excess over the fair value or fair cost of the improvement."

No attempt has been made in the evidence of the petitioners to show that the cost of the work was excessive, or that the portion of the assessment which is

equivalent to the fair value or fair cost of the improvement has been exceeded.

It will be observed that the above provision of law absolutely prohibits the vacation of an assessment for any reason in this form of procedure, and that it can only be reduced, on evidence showing that the cost of the work was fraudulently excessive, to the fair value or fair cost of the work.

This evidence being wanting, there is no basis even for a reduction.

The section quoted above from the Charter is substantially the same, and exactly the same so far as this argument is concerned, as section 903 of the New York City Consolidation Act (Laws of 1882, chap. 410) previous to its amendment by chapter 613 of the Laws of 1895.

This amendment of 1895 remained in force less than three years and is of no importance in the present case.

Section 903 of the Consolidation Act in turn was a re-enactment of section 12 of chapter 550 of the Laws of 1880.

The construction and meaning of this limitation upon the power of the Court to vacate or reduce assessments in this form of procedure has been before the courts for construction in numerous cases and, as we think, has been settled.

One of the principal and earliest cases is *The Matter of Smith*, 99 *New York*, 424.

The wording of the statute then before the Court is identical, in the respects now under consideration, with the present statute.

In that case the improvement for which the assessment had been laid was for the flagging of a sidewalk

and the proceeding was instituted under the same system of law, substantially, as the present proceeding, for the purpose of vacating the assessment.

It was decided in that case that the assessment was illegal and void, for the reason that the sidewalk had previously been flagged and an assessment therefor levied and paid, so that the assessment then under consideration was laid in direct violation of a statute. It was also held that although that was the case and there was no authority at law whatever for laying the assessment, still the Court had been deprived by the said statute of the power to grant any relief in that form of procedure. We cannot do better than quote from the opinion of the Court, written by Judge Finch, the following, which reviews the whole subject:

"The petitioner is pursuing his remedy under the provisions of the Act of 1858 (chap. 338) and its amendments. That is a special remedy. It was given in addition to and in excess of the usual and ordinary remedies of the citizen in repelling an unlawful levy and resisting an illegal claim. It was speedy and summary, confined to one locality, and designed to remedy evils peculiar to that locality. It was a remedy which the Legislature might give or refuse, and, having given, might modify or limit at its pleasure. Originally very broad and covering a large class of cases, it was, at a later period, very much narrowed and restricted (Laws of 1880, chap. 550, sec. 12). That restriction took the form of a positive prohibition. It forbade any interference with assessments through the operation of the special remedy as to all such confirmed after June 9, 1880, for any improvement completed after the date of the enactment, and whether such assessments were 'in fact or apparent,' 'void or voidable,' except that they might be reduced to the fair value of the actual improvement made. For all assessments back of June, 1880, the special remedy

remained unchanged, but from that time forward its sole possible application was to cases where the complaint could be redressed by reducing the assessment to the level of the just value of the improvement.

"It is argued that this amendment did not repeal, and was not intended to repeal, the act which forbids a repavement without the consent of a majority of the property-owners adjoining. That is true, undoubtedly. The amendment does not validate an illegal assessment; but it does narrow a special remedy, so that it no longer covers that particular wrong, and remits the injured party to the ordinary remedies of the citizens generally, except that a bill in equity to vacate the assessment or remove it as a cloud on title is forbidden (Laws of 1882, chap. 410, sec. 897). *The property-owner may still challenge the validity of the assessment whenever his property is seized under it or it is made the foundation of proceedings against him.*

"It is again argued that the amendment was intended to reach and must be construed to cover only cases of irregularity or fraud, in which an original authority to make the assessment existed, and not those in which there was no such authority. The language of the section does not permit such a construction. When it describes the assessments to which it applies not only as existing 'in fact,' but as merely 'apparent,' and not only as 'voidable,' but as 'void,' it carefully shuts the door upon any such limited construction; and lest the meaning should even then be doubtful, it adds that 'in no event shall that proportion of any such assessment which is equivalent to the fair value of any actual local improvement, with interest from the date of confirmation, be disturbed for any cause.' The emergency which led to the Act of 1858 is well understood. It was deemed to be of an exceptional nature, and for which a new and summary

remedy was needed. The applications to vacate became numerous and crowded the appropriate tribunals. In 1880, when the restrictive amendment was adopted, a local tribunal was established (secs. 906, 907, 908, 909, 910 and 911), empowered, wherever substantial injustice had been done by assessments confirmed before June of that year, to revise, modify or vacate the same; the evident purpose being to mainly concentrate in the local tribunal the class of litigation provided for, and leave the special remedy confided to the Court narrowed to the single case of assessments exceeding the honest and just value of the improvement. The courts below were, therefore, right in determining that the special remedy invoked by the petitioner had no application to the case which he presented."

There have been numerous other cases following this one, and entirely in accord therewith."

See—

Matter of Feust, 121 N. Y., 299.
Matter of Brainerd, 51 Hun., 380; affirmed 117 N. Y., 623.
Matter of Cullen, 53 Hun., 534; affirmed 119 N. Y., 628.

These cases were all decided after the consolidation act went into force, and hence when the law was in the same condition as it is at the present time. They are therefore controlling authorities at the present time equally as before.

The learned counsel for the petitioners made an elaborate attempt before the State courts to show that in the Greater New York Charter a change in the law had been made and the petitioners were entitled now to a vacation of the assessment.

He urged the following:

" The position of the petitioners is that the Charter " has provided a specific method of review under which

" the Court is authorized to wholly vacate and set aside " these assessments ; and that if the Corporation Coun- " sel's construction of the scope and effect of the pro- " visions of the Charter are correct, these provisions " are unconstitutional and void."

The following general answers may be given :

1st. The Charter is substantially the same in the provisions now material as the Consolidation Act was.

2d. The decisions referred to above were made when the law stood substantially the same in these respects as it stands now, so that the said decisions are as much in point under the Charter as they were before its enactment.

3d. It may be true that if the two sections involved stood alone they might not be entirely harmonious, yet, as in many cases of statutory construction, it is necessary to consider the two together, and in order to determine their meaning, it is also necessary to consider their history and origin. When this is done, the apparent inconsistency is explained.

4th. If we were driven to that extremity, we could invoke the well-known principle that the latter section, if inconsistent with the former, would be held to repeal the former and to furnish itself the law.

We understand the point made by the petitioners, put as simply as possible, is this :

It is provided in section 959 of the Charter that the Court may vacate an assessment for fraud or substantial error, while under section 962 the assessment can only be reduced because of fraud or substantial error.

We may concede at once that the wording of these two sections, when read together, is not as clear as

might be desired. The reason, however, why they stand in the form they do and their real meaning will be seen easily from the examination of their history.

We must remember that we are dealing with a special system of laws relating to the vacation and reduction of assessments for local improvements. This system originated with chapter 338 of the Laws of 1858, previous to the enactment of which statute there was no special law upon the subject, and we presume the only way in which a property-owner could then have been relieved of an illegal assessment for a local improvement was through an action in equity in the nature of a bill to remove a cloud upon title.

In order to provide a more expeditious remedy, the said chapter 338 of the Laws of 1858 was enacted. That act was as follows:

"CHAPTER 338.

"AN ACT in relation to frauds in assessments for local improvements in the City of New York.

"Passed April 17, 1858, three-fifths being present.

"*The People of the State of New York, represented in Senate and Assembly, do enact as follows:*

"Section 1. If in the proceedings relative to any assessment or assessments for local improvements in the City of New York, or in the proceedings to collect the same, any fraud or legal irregularity shall be alleged to have been committed, the party aggrieved thereby may apply to a judge of the supreme court, in special term or in vacation, who shall thereupon, upon due notice to the counsel to the corporation of the city in which the lands so assessed are situated, proceed forthwith to hear the proofs and allegations of the parties.

"Sec. 2. If, upon such hearing, it shall appear that the alleged fraud or irregularity has been committed the said assessments shall be vacated, and the lien created thereby, or by any subsequent proceedings, shall cease.

"Sec. 3. On the production of the certificate of the judge before whom the proceedings shall be had that a judgment vacating any assessment has been made by him, it shall be the duty of the officer having charge of the assessment lists to cancel thereon the assessments so vacated and all proceedings under the same.

"Sec. 4. Any person applying for relief, under the provisions of this act, may embrace in one proceeding any or all assessments, for local improvements, in which he is interested.

"Sec. 5. Any lands which may be discharged from any lien for an assessment for any local improvement, may be again assessed, in the manner now provided by law, for such amount as would have been justly chargeable if fraud or irregularity had not been committed; but the amount so assessed shall be a lien on said lands until paid, and shall be collectible in the manner now provided by law for the collection of assessments, but all proceedings to make a new assessment shall be at the expense of the corporation of the city in which the lands may be situated.

"Sec. 6. This act shall take effect immediately."

The object of this act was to allow the summary vacation of an assessment where there was any fraud or irregularity therein. This act is the foundation of the sections in the Charter referred to below, and also of the corresponding sections in the Consolidation Act.

It was found, however, in practice, that the act as construed by the courts resulted in the vacation of

numerous assessments for technical reasons, and the act was altogether too broad and afforded too little protection to the City. Hence the Legislature restricted the remedy by enacting what were practically amendments of the act.

The first one of importance was section 7 of chapter 580 of the Laws of 1872. This act was amended by chapter 313 of the Laws of 1874. This amended act is substantially identical with section 960 of the Charter, except that the last clause in the section of the Charter relating to sales (which, of course, is immaterial here), was not in the Act of 1874.

In the year 1874 another amendment also was made by chapter 312 of the laws of that year, striking out from the first section of the Act of 1858 the words, "or legal irregularity," also striking out from the second section the words, "or irregularity." This act also introduced a provision abolishing the remedy by bill in equity, which provision was incorporated into section 897 of the Consolidation Act, which is now section 958 of the Charter.

The evil arising from the vacation and reduction of assessments was still so great that it became necessary to appeal to the Legislature again, and the result was that chapter 550 of the Laws of 1880 was enacted. That act created a tribunal known as the Assessment Commission, which was enacted to give relief as to the old assessments and to restrict the power of the Court in new cases to very narrow limits, and it is from the twelfth section of that act that the section on which the City relies on this case was taken, to wit, section 962 of the Greater New York Charter, printed in full on pages 20 and 21 of this brief as well as in the appendix.

The next legislation on the subject was the Consolidation Act, in which the various provisions of law

which we have referred to above were codified and re-enacted.

The provisions of the Charter are substantially the same in all respects material to the present case as the Consolidation Act. Section 958 of the Charter is the same as section 897 of the Consolidation Act; section 959 of the Charter is substantially the same as sections 898 and 900 of the Consolidation Act, the latter section being added to the former one. Section 960 of the Charter is almost the same as section 899 of the Consolidation Act; section 961 of the Charter is the same as 901 of the Consolidation Act; section 902 of the Consolidation Act was taken from chapter 550 of the Laws of 1880 and was omitted from the Charter because obsolete; section 962 of the Charter is substantially the same as section 903 of the Consolidation Act before the amendment thereof by chapter 613 of the Laws of 1895; section 963 of the Charter is the same as section 904 of the Consolidation Act; section 964 is the same as section 905 of the Consolidation Act.

We therefore find that, except as to certain temporary provisions which have now become obsolete, the Charter and the Consolidation Act are substantially the same.

It is evident from what we have shown above that the incongruity between the sections 959 and 962 of the Charter arises from the fact that the restriction of remedies, established in 1874, have been continued in the Consolidation Act and in the Charter, although they are really superfluous after the enactment of chapter 550 of the Laws of 1880. If, therefore, we go back to the statutes which were codified above by the Charter and by the Consolidation Act, we find that the provision on which we rely comes from the Act of 1880, which is the latest independent act, so that if, in any way, it is inconsistent with the previous act it repeals

the former; and if it is necessary to go to that length in considering the Charter, section 962, being the later section, will repeal the former section, to wit, section 959, the familiar principle being that the latter section, in such case, is considered the later expression of opinion by the Legislature and is controlling.

In the case of the Elm Street Widening, Mr. Justice Patterson, on the motion for the appointment of Commissioners, had occasion to consider a case much more extreme than the present one.

He wrote as follows:

"The question then arises as to the sufficiency of the provisions of the Consolidation Act referred to to secure the payment to the property-owner of the compensation to which he is entitled, and at the outset of that inquiry it is claimed that section 992 of that act, as amended in 1893, and as it now reads, is so defective and contradictory in its provisions that a property-owner would not be sure of a prompt and complete remedy, but might be subjected to the delays and uncertainties attending doubtful constructions of ambiguous, contradictory and mutually destructive provisions of that section. It is apparent that this section bears the stamp of slovenly legislation. In one and the same section it is provided that the property-owner may have an action for his award, and also that he shall not have an action but another proceeding. To those acquainted with the method of preparing for legislative consideration enactments amendatory of existing statutes, this contradiction is easily accounted for; but the fact remains that, as the section reads, there are two inconsistent provisions. One does not, however, by necessary legal interpretation, nullify the other, nor can there be any doubt whatever of the legislative intent. An inspection of the prior statute and an understanding of what the Legislature proposed

to accomplish by the amendment of 1893 will show that it was intended that the provisions concerning an action should be superseded by those furnishing the more summary and expeditious remedy by mandamus. Under such circumstances the rule of construction is well settled, although it is one only to be resorted to in extreme cases and where all efforts to reconcile conflicting provisions are futile; and such is the case here.

"The rule referred to is: 'If the latter part of a statute be repugnant to the former part thereof, it shall stand; and so far as it is repugnant, be a repeal of the former part, because it was last agreed to by the makers of the statute' (quoted from Bacon's Abridgment in Harrington *vs.* Trustees of Rochester, 10 Wend., 547), and in Sedgwick on Statutory Limiations it is stated in the same words."

This opinion was rendered after full argument and much consideration and is only reported, as far as we know, in The New York Law Journal of February 8, 1895 (page 1163). No appeal was taken, nor has the correctness of the decision been questioned by any Court, so far as we can ascertain.

II.

IT IS NOT TRUE THAT THE PROPOSITION CONTAINED IN THE FIRST SUB-DIVISION LEAVES THE PETITIONERS WITHOUT REMEDY, SUPPOSING THE ASSESSMENT TO BE ILLEGAL.

It may be urged that, if our contention is correct, the petitioners will be in the position of having had an illegal assessment imposed upon their property, and not be able to get rid of it, and be without remedy.

In this connection, we beg to refer again to the quotation, from *Matter of Smith*, 99 N. Y., 424, printed above (pp. 22 and 23).

The argument on this question was presented years ago, and came before the Court of Appeals in *Lennon* vs. *The Mayor, etc.*, 55 N. Y., 361.

In that case, it appeared that the assessment was illegal and void, and the plaintiff sought, therefore, to restrain the sale of his property for the non-payment of the assessment, and to have the sale and assessment declared void and vacated. The following is from the opinion of the Court in that case, written by Judge Rapallo:

"It was competent for the Legislature to deprive the courts of the power to give this relief, and the parties of the benefit of this form of remedy. The mere abortive attempt to impose the assessment and the outstanding record thereof, did not deprive the plaintiffs of any of their property; and although inconvenient to an owner to have an apparent lien upon his land, yet he has no such constitutional right to the aid of a court of equity to remove such cloud upon his title that the Legislature may not deprive him of that particular remedy. It is only when the pretended lien is sought to be enforced by the taking of his property, that the owner is protected by the Constitution. If the assessment in question has not been effectually validated, the plaintiffs may resist its collection, or the title of any purchaser who may claim, by virtue of a sale had under it. Their constitutional rights will then come directly in question. But no such right is violated by precluding them from taking the initiative to remove the apparent lien upon their property."

Now let us apply that decision to the present case. If it were conceded, for the sake of argument, that the assessment is illegal, the petitioners would not be deprived of all remedy by the denial of this motion. Their property would not be taken from them, nor could it be taken from them, if the assessment is illegal, for the

Constitution, as shown in the *Lennon* case, would always prevent such a result. Suppose the present assessments are illegal, and that the order denying the motion to vacate is affirmed, what will result to the railroad companies? They are in possession of the property, under the deeds through which they claim ownership, and they are not bound to pay the assessment. If the City should try to enforce payment, it would be obliged either to bring an action for money due as a personal claim against the railroad companies, or it would have to take proceedings to sell the property for the non-payment of the assessment.

If the City should bring suit against the companies, they could always set up the illegality of the assessment, and hence would defeat the City's claim.

If the City should take proceedings to sell the property for the non-payment of the assessment, and the railroad companies should simply remain inactive, a lease would eventually be delivered by the City to the purchaser, but that would not put the purchaser in possession of the property. It would be necessary for him to bring an ejectment suit against the railroad companies and to rely on his lease. That suit the railroad companies could always defeat, because they could show that the assessment was illegal, and hence that everything, including the lease founded thereon, would be invalid. Thus the City could not enforce the collection of the assessment, and the railroad companies could not be deprived of their property. They would thus not be without remedy, and their rights would not have been violated if the construction of the statute for which we contend is sustained, as was held in the Lennon case.

The following may also be observed: If the City should take such action as would be considered compulsion on its part, and the plaintiffs should pay the assessment under compulsion, the railroad companies

could recover the money paid in an action for that purpose, on the authority of *Tripler* vs. *The Mayor, etc.*, 125 N. Y., 617 (and after a new trial 139 N. Y., 1), *Poth* vs. *The Mayor, etc.*, 151 N. Y., 16, and similar cases.

III.

IF IT SHOULD BE THOUGHT NECESSARY TO CONSIDER THE LEGALITY OF THE ASSESSMENT, THEN IT IS URGED THAT THE PETITIONERS HAVE ENTIRELY FAILED TO SHOW THAT THE ASSESSMENT IS ILLEGAL.

As stated above, these assessments have been imposed upon real estate belonging to the railroad companies. It appears that this real estate is owned by them in fee simple. There is nothing to prevent the railroads from selling it, should they choose to do so. Only a part of the land is used for railroad purposes. The rest is merely land in the same situation as any other land in the vicinity upon which the railroad companies could erect buildings, or which they could sell for any purposes at any time.

As to the part of the land on which the railroad tracks are laid, running through the cut, this land is also owned by the railroad companies in fee simple, and it is not at all impossible that, at some time, the railroad companies might cease to use this land for railroad purposes, and might sell it for any uses to which real estate may be put.

In fact, as their own engineers admitted, on examination, it would be perfectly feasible to construct buildings, which could be used for general purposes, over the cut through which the railroad companies' trains could continue to run, without seriously interfering with the use thereof by the railroad trains.

In fact, several of the railroad's own stations are built over this cut, and are buildings on or over the

land on which the tracks are laid, used for the business of the railroad.

The following appears in the record at page 17, from the testimony of Mr. Haviland:

> "The two nearest stations of the railroad to these improvements are, one at Wendover avenue near its southerly end, and one at Tremont avenue at the extreme northerly end of the area of assessment of the improvement. These streets upon which these improvements were constructed are part of the street system leading to and from these stations, and the avenue is contiguous to the railroad on the easterly side; these stations are passenger stations and certain trains of the petitioners stop for the receiving and discharging of passengers at certain times, and a person coming to or going from one of these stations would or could pass over these roads."

The railroads would thus seem to be particularly benefited by the building of suitable means of access to their stations. From the passengers and freight which come and go therefrom the railroad derives a part of its profit. The Assessors, and the Appellate Tribunal of the Board of Assessors, to wit, the Board of Revision of Assessments, the members of which are sworn officers of the City, have, in the exercise of their special functions, determined that the railroad lands have been benefited to the extent of the assessment imposed. Their decisions and conclusions are, of course, entitled to the greatest weight, and the Court should not interfere in them except in the clearest case.

The Court, however, is here asked to nullify the action of these two tribunals, specially charged by law with the duty of imposing assessments according to benefit, on the testimony of two employees of the rail-

road companies; one of them, Arthur Haviland, a civil engineer, now and for a long time in the employ of the railroad companies; the other, Edgar Van Etten, general superintendent of the companies.

The witnesses testified that the total assessment is in excess of the fair value of the improvement; that is to say, that the fair value of the improvement to the railroad companies is nothing. The line of examination was duly objected to, and the point clearly made that the words, "The fair value of the improvements," as used in the statute, means the fair cost to the City of New York of the actual work of construction. The words of the statute are, "The fair value, or fair cost," and above, in the same statute, it is provided that an assessment can only be reduced to the extent of the excess in dollars and cents caused by fraud or substantial error. That this is the meaning of the statute is clearly shown in *Matter of Smith*, 99 *N. Y.*, 424, which we have cited above. It is plain, from the statute, and the decisions to which we have referred, that it was the intention of the Legislature to restrict the power of the Court in the present form of procedure to reducing an assessment in a single case, where the cost of the work was excessive. Where that was the case the Court should reduce the assessment to such a sum as would represent a fair cost, if the assessment was illegal, and if, for any reason, whether from lack of power to undertake the work or because it was of no benefit to the property assessed, there could be no remedy in this form of procedure, and such has been the practical construction which has been put upon the statute for many years.

The whole case of the petitioners rests on the testimony of two employees of the company, who swore that, in their opinion, the land of the companies is not benefited by the improvements, so that, according to the petitioners' theory, any assessment in the City of New

York should be vacated, provided you can get two witnesses, even agents or employees of the petitioner, to swear that, in their opinion, the assessment does not benefit the property. If such a theory were to prevail, the Courts would have to vacate every assessment made in the City of New York.

It would seem that the opinions of the five assessors and the three members of the Board of Revision should outweigh the opinions of the two employees of the railroad.

SECOND POINT.

Turning now to the attempted application of the Federal Constitution, laws, and jurisdiction of the Supreme Court of the United States to this case, we urge that the writ should be dismissed for the reason that a case is not made out by the record within the meaning of section 709 of the United States Revised Statutes and the decisions of this court thereunder.

The learned Counsel for the railroad companies attempt to bring the case before this court and to persuade it to overturn the decisions of the three courts of the State of New York, and the local procedure that has been in operation for a long period of years by holding that the system is in violation of the following clause from the Fourteenth Amendment to the Constitution of the United States, to wit, "NOR SHALL ANY STATE DEPRIVE ANY PERSON OF LIFE, LIBERTY OR PROPERTY WITHOUT DUE PROCESS OF LAW."

They invoke section 709 of the United States Revised Statutes as to the jurisdiction of the Supreme Court in respect to judgments or decrees of State Courts on writs of error.

The material parts of this section are as follows:

> "A final judgment or decree in any suit in the highest court of a State, in which a decision in the suit could be had, * * * where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity; * * * may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify or affirm the judgment or decree of such State court, and may at their discretion award execution, or remand the same to the court from which it was removed by the writ."

We have shown at length under our statement of facts that no federal question was raised by the railroad companies in the course of the procedure terminating with the confirmation of the assessments; that is, neither before the Board of Assessors nor before the Board of Revision was there any hint that the petitioners objected to the proposed assessments on this ground.

Furthermore, when the question came before the Court at Special Term in the initial step before that Court, to wit, the petition, not a word was said or hint given that the assessments were attacked as unconstitutional. Nothing is said either in the opinion of the Appellate Division nor in the memorandum of the Court of Appeals whatever upon this point. The only ground for claiming that a federal question was raised at all is that it appears from the certificates of Presiding Justice Van Brunt and Chief Judge Parker that *in*

the briefs for the railroad companies before their respective courts certain statements were made. But even in those statements there is no distinct reference to the Federal Constitution. Their argument rather was that a construction of certain State statutes contrary to their contention, would result in depriving them of all remedy and thus be violative of section 6 of Article 1 of the New York State Constitution which, like the Federal Constitution, also provides that no person shall "be deprived of life, liberty or property without due process of law," and hence that such a construction should not be favored.

This is a legitimate argument in itself, but very different from urging that the State statutes are as matter of fact violative of the Federal Constitution.

This attempt to have the State statutes declared unconstitutional is, we believe, an afterthought subsequent to the decision of the Court of Appeals.

Before citing cases under this point we call attention to the following:

(1) Section 709 of the Revised Statutes requires, among other things, that the judgment or decree must be in a *suit*.

But, as we have already stated, the present proceeding is not a suit in the technical sense, nor in the sense that the word is used either in law or equity. Nor is it a controversy arising in an application for, for instance, one of the great common law writs like the writ of mandamus or writ of certiorari, or writ of habeas corpus, but, as we have urged, the controversy arises under certain special peculiar provisions of statute in which the courts can proceed only in a narrow restricted manner and can only give certain relief, nor does their action make the rights of the petitioners *res adjudicata*. The action of the State courts

is rather in the nature of an interlocutory order or decree.

(2) Section 709 of the Revised Statutes also requires, among other things, that the judgment or decree shall have been rendered in the highest court of a State.

It is true that the Court of Appeals, in which this decision was rendered, is the highest court in the State, and that the Supreme Court is the highest court of first instance, and having general jurisdiction in law and in equity, but it is not true that either the Court of Appeals or the Supreme Court, *in this case*, acts as a court of general jurisdiction, because, under the statutes, they can give relief only under certain conditions. They cannot vacate the assessments or give relief simply because they are illegal. They therefore are in reality, so far as this litigation is concerned, courts of limited jurisdiction. The principle underlying section 709 of the Revised Statutes is, it seems to us, that the decision must have been an adjudication upon the rights of an individual in regard to the subject matter rendered by the highest court of the State *acting as a court of full, general jurisdiction, applying the principal of common law and equity and the statutory law peculiar to the State.*

(3) Section 709 of the Revised Statutes requires among other things that the judgment or decree must be final.

We submit that the decree or judgment if such it be called is not a final decree or judgment in the sense in which that word is used in the said section. In fact, there is no judgment or decree at all in the technical sense, but only an order or rule. The judgment or decree is final in the sense that it terminates the particular proceeding, but it is not final in the sense that it determines the rights of the parties to the controversy. It is not final in the

sense that it determines that the assessment is legal. There is nothing to prevent the railroad companies bringing a suit to remove this assessment as a cloud upon title, if they are right in their contention that the statutes which purport to deprive them of this right are unconstitutional. Should they pay the assessments under compulsion, there is nothing to prevent their bringing suit to recover the amount paid, if the assessment is illegal. Should they decline to pay, and efforts be made to force the collection of the assessment, they could always defeat a claimant to their land in an ejectment suit on the ground of illegality of the assessment.

The so-called judgment or decree, therefore, in this case, cannot be said to be final, in the sense that it is a final disposition of the railroad companies' rights. It is merely a denial of a particular request made under particular restrictions, or, as said above, it is in the nature of an interlocutory order or decree.

We therefore submit that the case has not been brought within the technical requirements of section 709 of the Revised Statutes, neither in letter nor in spirit; that no case has been presented of which this Court has jurisdiction and hence that the writ should be dismissed for this reason alone.

We will refer briefly to a few decisions of this Court:

The Federal question was not raised at the proper time and manner below.

Duncan vs. *Missouri*, 152 U. S., 377.
Eastern Building Association vs. *Welling*, 181 U. S., 47.
Columbia Water Power Co. vs. *Columbia Electric Co.*, 172 U. S., 475.
Leeper vs. *Texas*, 139 U. S., 462.
Yazoo and Miss. R. Co. vs. *Adams*, 180 U. S., 1.

The error must appear on the face of the record.

Miller vs. *Cornwall R. Co.*, 168 U. S., 131.

A writ of error to a State court brings before the Supreme Court only the federal question in the case.

Ashley vs. *Ryan*, 153 U. S., 436.

An order upon a return to a writ of habeas corpus is not a final judgment.

Clarke vs. *McDade*, 165 U. S., 168.

Neither is a judgment of the Supreme Court of the State final which reverses an order overruling a demurrer or remands the case for further proceedings.

Great Western Telegraph Co. vs. *Burnham*, 162 U. S., 339.

Union Mutual Life Ins. Co. vs. *Kirchoff*, 160 U. S., 374.

The decision of the highest court of the State ordering a lower State court to discharge a rule for contempt is not a final judgment.

Newport Light Co. vs. *Newport*, 151 U. S., 527.

Neither is an order overruling a motion to quash an injunction.

Loeber vs. *Schroeder*, 149 U. S., 580.

Where the State Supreme Court remanded a cause for further proceedings the judgment was held not final.

Rice vs. *Sanger*, 144 U. S., 197.

Neither is the judgment of the State's Supreme Court merely affirming an interlocutory order of the lower court.

Meagher vs. *Minnesota Mfg. Co.*, 145 U. S., 608.

The order of the State Judge at Chambers in a habeas corpus case is not reviewable.

McKnight vs. *James*, 155 U. S., 685.

In *Newport Light Company* vs. *Newport*, 151 U. S., 527, it was held that the certificate of the Chief Justice of the State court does not of itself establish the existence of a federal question and confer jurisdiction upon the Supreme Court to re-examine the judgment complained of, and in the opinion in that case it was written as follows:

> "This Court must determine for itself whether the suit really involves any federal question which will entitle it to review the judgment of the State court under section 709 of the Revised Statutes."

See also *Yazoo & Miss. R. Co.* vs. *Adams*, 180 U. S., 41.

In *Turner* vs. *Richardson*, 180 U. S., 87, the head note is as follows:

> "It is again decided that to render a Federal
> "question available on writ of error from a State
> "court it must have been raised in the case before
> "judgment, and cannot be claimed for the first
> "time in a petition for rehearing."

THIRD POINT.

Under this point we shall assume, for the sake of argument, that we are wrong in our contentions elsewhere that the writ should be dismissed, and shall assume that the plaintiffs in error have presented a case which calls upon this Court to determine whether the decisions of the State courts are violative of the Federal Constitution. We shall urge that the decisions of the State courts should be affirmed.

The position of the railroad companies is that the decisions of the State courts would result in a violation of the Fourteenth Amendment of the Federal Constitution by depriving the plaintiffs in error of their property without due process of law.

They also rely upon section 709 of the United States Revised Statutes, which we have quoted under the previous point, to give this court jurisdiction.

In other words, they claim that the decisions of the State courts draw in question the validity of a statute of, or an authority exercised under, the State of New York, on the ground of its being repugnant to the Constitution of the United States, and the decisions are in favor of the validity of the State law. That is, they urge that certain State laws have been held valid, with the result that the Federal Constitution has been violated and that it follows that the decision deprives them of their property without due process of law.

I.

THE CONTENTION OF THE PLAINTIFFS IN ERROR ON THIS POINT HAS BEEN IN EFFECT DECIDED AGAINST THEM BY THE NEW YORK COURT OF APPEALS IN OTHER CASES.

The leading case is *Lennon* vs. *The Mayor*, 55 N. Y., 361 (1874).

Counsel cite no decisions of this court which they claim overrule or conflict with that decision, nor in fact do they cite any decisions of any courts to that effect. We think we may properly add that they cite in their elaborate and learned brief very few decisions of the Federal Courts and none having any direct bearing on the vital points of this case.

The decision in the *Lennon* case seems to us entirely applicable to the present case and decisive thereof, unless this court shall overrule that case and decide to the contrary. In fact, the present case is much less favorable to the view of our opponents than the *Lennon* case, for the reason, among others, that the latter was a suit in equity for an injunction and to have the assessment declared void and vacated, while the present case arises in a special proceeding.

As noted above, the provisions of the Federal Constitution and of the New York State Constitution to the effect that no person shall be deprived of his property without due process of law are substantially the same. The opinion of the Court of Appeals in the *Lennon* case is thus equivalent to an opinion by that court upon the said clause of the Federal Constitution.

We have already discussed the *Lennon* case under the second subdivision of our first point, but we will refer to it again in this connection.

In the *Lennon* case a certain assessment in the City of New York was concededly illegal, because certain resolutions had not been advertised as required by law. A certain statute which is a part of the system now before this court provided that no assessment should be vacated or set aside for omissions to advertise and thus deprived the court of power to grant the relief demanded, viz., "that the assessment be declared null and void and be canceled and discharged of record and the defendants perpetually restrained from

collecting it." This relief was demanded in an equity suit to restrain the City from executing a lease to the plaintiffs who had bought at the sale of the property for the non-payment of said assessment. It was argued that the said statute depriving the court of that power was in violation of the State Constitution. The following is from the opinion of the Court of Appeals, speaking through Judge Rapallo:

> "It was competent for the Legislature to deprieve the courts of the power to give this relief, and the parties of the benefit of this form of remedy. The mere abortive attempt to impose the assessment and the outstanding record thereof did not deprive the plaintiffs of any of their property; and although inconvenient to an owner to have an apparent lien upon his land, yet he has no such constitutional right, to the aid of a court of equity to remove such cloud upon his title, that the Legislature may not deprive him of that particular remedy. It is only when the pretended lien sought to be enforced by the taking of his property that the owner is protected by the Constitution. If the assessment in question has not been effectually validated the plaintiffs may resist its collection or the title of any purchaser who may claim by virtue of a sale had under it. Their constitutional rights will then come directly in question. But no such right is valid by precluding them from taking the initiative to remove the apparent lien upon their property. * * * The prohibition is general and not confined to any particular form of proceeding, and the saving clause at the end of the section indicates that the Legislature intended it to apply to suits as well as to special proceedings."

The Lennon case has been cited and followed in Eno vs. *The Mayor*, 68 N. Y., 214; *Dolan* vs. *The Mayor*, 62 N. Y., 472.

In *Chase* vs. *Chase*, 95 N. Y., 373, it was held that the restrictions upon the Court's power to vacate assessments by the special statutes under consideration applied to affirmative judicial proceedings, but did not affect the common law right of the property-owner to interpose a defense against a claim under the assumption that it was absolutely void.

It has also been held that these statutes do not apply to a case where the assessment has been paid, and therefore that if a man pays by compulsion an illegal assessment he can recover the same from the City in an action at law, and these statutes will afford the City no defense.

Jex vs. *The Mayor*, 103 N. Y., 213.
Poth vs. *The Mayor*, 151 N. Y., 14.

In *Scudder* vs. *The Mayor*, 146 N. Y., 245 (1895), the action was to enjoin the City from collecting the assessment, or attempting to enforce it in any way, and to have it declared void and uncollectible. The statute involved in the *Scudder* case, as forbidding an action in the nature of a bill in equity to remove a cloud upon title, was relied upon as a defense.

Judge Peckham wrote the opinion of the Court of Appeals holding the defense good. It was held that the said restriction was intended to confine property-owners in all cases of alleged void assessments to the remedy provided for in the act. The *Lennon* case was cited as an authority and held not to aid the plaintiff's case.

It thus appears that the *Lennon* case and the others just cited have established the doctrine, so far as the courts of the State of New York are concerned, that the very statutes now urged by the railroad companies to be unconstitutional have been held constitutional under the provisions of the New York State Con-

stitution, which are substantially identical with the Federal Constitution in the points now under consideration.

We venture to offer the following in support of these decisions, although as already indicated we do not find them disputed in any reported decisions:

II.

IT IS EVIDENT IN THE FIRST PLACE THAT THE RAILROAD COMPANIES HAVE NOT AS MATTER OF FACT BEEN DEPRIVED OF THEIR PROPERTY. THERE IS NO SUGGESTION THAT THEY ARE NOT IN POSSESSION OF THE LAND AND USING IT AS THEY PLEASE, AND IT STANDS ADMITTED, IN EFFECT, ON THE RECORD THAT THEY HAVE NOT PAID THE ASSESSMENTS AND THUS PARTED WITH ANY MONEY ON ACCOUNT THEREOF. IT MUST THEREFORE BE ADMITTED AT ONCE THAT THEY HAVE NOT AS YET BEEN DEPRIVED OF ANY OF THEIR PROPERTY, EITHER BY DUE OR UNDUE PROCESS OF LAW, OR BY FORCE OR IN ANY OTHER WAY.

III.

THEY CAN ONLY URGE, THEREFORE, THAT THE RESULT OF THIS DECISION MUST NECESSARILY BE THAT THEY WILL BE, OR MAY BE, DEPRIVED OF THEIR PROPERTY AT SOME TIME OR IN SOME MANNER. THAT SUCH CAN BE THE CASE WE DENY *in toto*.

It is necessary to consider this phase of the subject with the greatest care and to think clearly and distinctly about it.

Let us consider first what these statutes are. They have been described at length in our first point, and it will be only necessary here to state their substance

briefly. Down to the year 1858, if a property-owner claimed an assessment to be illegal, or to remove it from the records and cancel the lien thereof, his remedy was by bill in equity, to remove it as a cloud upon title.

This was found to be an unsatisfactory remedy, and hence chapter 338 of the Laws of 1858 was enacted, which established the procedure that was followed in this case. It is quoted in full under the first subdivision of our first point. This statute was intended to provide a summary method of vacating illegal asssessments.

It was found, however, that the Act of 1858 rendered the vacation of assessments too easy and resulted in great loss to the City of New York from the vacation of assessments because of technical irregularities and defects. Hence, various restrictions upon the power of the courts to vacate or reduce assessments were enacted by the Legislature, which it will not be necessary to describe in detail. The statutes thus finally got into the condition in which we now find them.

By chapter 312 of the Laws of 1874 the second section of the Act of 1858 was amended so as to read as follows:

> "If upon such hearing it shall appear that the alleged fraud or substantial error has been committed, the said assessment shall be vacated and the lien created thereby, or by any subsequent proceedings shall cease, and hereafter no suit or action in the nature of a bill in equity, or otherwise, shall be commenced for the vacation of any assessment in said city or to remove a cloud upon title; but owners of property shall be confined to their remedies in such cases to the proceedings under the act hereby amended."

The latter part of this section is substantially the same as section 958 of the Charter quoted in full in the appendix.

The Legislature has therefore declared that one particular system shall be followed to obtain relief from illegal assessments by vacating or reducing them while they remain unpaid and an apparent lien. While they remain in that condition the property-owner has such remedy as the Legislature has seen fit to give him under the laws as construed by the State Courts. But whether this remedy is a satisfactory one or not it does not result in depriving the property-owner of his property, and therefore there is nothing unconstitutional about it. The Constitution does not protect a man against illegal charges and apparent liens which are not really such, but however unpleasant and inconvenient they may be his constitutional rights are not violated until he is actually deprived of his property without due process of law, or put in such position that he would or could be deprived of his property because he has no legal means of resisting the actual deprivation thereof. It is plain that the railroads have not been put in any such position in the present case.

IV.

LET US CONSIDER NEXT WHAT IS THE NATURE OF THESE ASSESSMENTS. ARE THEY JUDGMENTS, DECREES OR ORDERS UPON WHICH FOLLOW, AS MATTER OF RIGHT, SOME PROCESS OF THE COURT, LIKE AN EXECUTION OR AN ATTACHMENT, THE ENFORCEMENT OF WHICH THE RAILROAD COMPANIES COULD NOT LAWFULLY RESIST. NOT AT ALL. THEY ARE SIMPLY CHARGES AGAINST THESE COMPANIES UPON THE CITY'S BOOKS.

The situation is as though a board of audit had gone over the claims which the City may have against

various persons and had determined that the amount thereof against these railroad companies was the sums which the assessors have declared to be assessments upon the property. Calling them liens upon the railroad's real estate makes no difference in the nature of the assessments. They are not liens unless they are valid charges, and cannot be collected unless they are valid. Calling them liens does not operate to deprive the railroad companies of their property, because it cannot directly or indirectly result in taking their property away from the railroad companies unless, as matter of fact, they are valid liens.

The suggestion at page 13 of the Brief for the Railroad Companies that the lessee would take the risk of forfeiture of its lease wherein it covenanted to pay assessments is thus without force. It agreed to pay *valid* not invalid assessments, and whether the assessments were valid or not could always be determined in a suit between lessor and lessee.

V.

LET US NEXT CONSIDER HOW THESE CLAIMS ARE TO BE COLLECTED. WHAT CAN THE CITY DO TO ENFORCE PAYMENT?

There are only two courses which the City could take to collect the money: First, it might treat the assessments as personal claims against the railroad companies and bring suit thereon. If it should do so it would always be defeated in the litigation if the assessments are illegal, and hence no attachment or execution could issue under which the railroad companies could be deprived of their land.

The second remedy is by sale of the land for the nonpayment of the assessments. The principal sections of the Charter providing this remedy are printed in the

appendix. Now, let us see what would be the result if the City should attempt to collect the claim by use of that remedy. Under the system provided by these statutes the City of New York would have to sell the land to the person who would pay the assessment in consideration of receiving a lease of the land for the smallest number of years. Such person would eventually receive from the City a lease of the property for the period which he bid at the sale, *but this lease would not give him possession of the property. The railroad companies would still retain possession and could be ousted thereof only through an injunction following a judgment in an ejectment suit.*

But in the ejectment suit the railroad companies would merely have to show the illegality of the assessment, if it is illegal, whereupon the purchaser must be defeated in the ejectment suit, and hence judgment could not go against the railroad companies and they could not be deprived of their land as a result of the judgment.

It thus follows that the railroad companies have not and cannot be deprived of their property without due process of law as a result of the State Courts refusing to vacate these assessments, and hence that there is no ground for interfering with the decisions of the State courts under the Federal Constitution and laws.

FOURTH POINT.

The question whether the statute depriving a property-owner of the remedy of an action in equity to remove the assessment as a cloud upon title is not before this Court.

An argument of the counsel for the railroad companies is that the State statute, by depriving the property-owner aggrieved by the assessment of the ordinary remedy of an action in equity to remove the same as a cloud upon title, and restricting him to a particular statutory remedy which in this case has not resulted in any relief to him, has taken away all remedy, and that that is equivalent to taking away his property by force of an illegal assessment.

It is quite possible, as the counsel urge, that a case might arise where the taking away of all remedy for an illegal act would be equivalent to attempting to legalize an act which would result in a violation of the Constitution. No such case is presented here. We have shown in our previous point that no such result can follow the present case.

There is another phase of the subject which we have alluded to already. It is this. The decision of the State Courts in this particular suit denying the railroad companies' motion to vacate the assessments does not necessarily involve the said court's holding that the taking away of the remedy by bill in equity is constitutional. All that it is necessary to hold in order to sustain the decisions of the State courts is that under the State laws, as construed by the State courts, the said companies were not entitled to vacation of the assessments on the evidence submitted.

It might very well be that the Court should make this ruling and at the same time hold, if the question

were brought before it, that the statute taking away the remedy by bill in equity is unconstitutional. The two remedies might co-exist, and a property-owner might be left to his choice between the two. The remedy by petition being summary and inexpensive, might be preferred to the more cumbersome and expensive remedy of a suit in equity.

We urge, therefore, that the State courts have not necessarily held in this particular case that the act taking away the remedy by bill in equity is constitutional.

The proper way to test the question whether or not such a bill would lie is to file such a bill and proceed to litigate the matter in that form of action.

If the City raised the objection that the remedy by bill in equity had been taken away by statute, and the Court sustained the objection and therefore dismissed the suit, the case would then be presented whether or not the act was constitutional. It is apparent that this has not been done, and so we think that it can be properly urged that the question of the constitutionalty or unconstitutionalty of the said provision is not really before this Court.

FIFTH POINT.

A question of fact is raised which this Court will not examine.

Although we are not willing to rest our case upon this point alone, we nevertheless believe that it could be properly disposed of in this Court by holding that whether or not the railroad companies' land was benefited by this improvement is a question of fact which this Court will not review.

It is, of course, fundamental to the railroad companies' case that the assessment should be illegal. If it is a perfectly legal assessment they have nothing to complain of; the only ground on which they claim it to be illegal is that the street improvements were of no benefit to their property.

It has already been held by the Assessors and the Board of Revision that the railroad companies were benefited to the extent of the assessment, and it has been at least impliedly so held by the Special Term of the Supreme Court. We suppose it will not be necessary to cite cases to show that this Court will not review the facts in such a case for the purpose of reversing the action of the Courts below. *We have reviewed under the third subdivision of our first point the evidence in this case, but we respectfully suggest that what we have written there be read again in this connection.*

SIXTH POINT.

We thus arrive at the conclusion that the writ should be dismissed, or, if the case is in such a shape that this Court is called upon to review the decision of the State Courts, then the decision of those Courts should be affirmed.

New York, April 14, 1902.

GEORGE L. RIVES,
Corporation Counsel.

GEORGE L. STERLING,
Of Counsel.

APPENDIX.

Being a Reference to, and Quotations from, Certain Statutes of the State of New York.

The provisions of the New York State Statutes that have a bearing upon the subject, are as follows:

The Greater New York Charter.

This statute in the form applicable to this litigation is chapter 378 of the Laws of 1897 and is printed as the third volume of the Session Laws of the State of New York for the year 1897. This statute is a codification of the various special and local laws applicable to the City of New York after consolidation with the City of Brooklyn and other municipal corporations in the vicinity. This statute is divided into chapters, titles and sections. Chapter XVII. of this statute relates to Taxes and Assessments and the sections of this chapter are numbered from 884 to 1054. The assessments with which we have to deal are for local improvements other than those confirmed by a Court of Record. The other classes of assessments which are confirmed by a Court of Record arise from the exercise of the right of eminent domain in taking property for public uses, generally for the opening, widening and extending of streets.

The provisions as to local assessments other than those confirmed by a Court of Record, being the ones with which we are now dealing, are contained in title 2 of said chapter XVII., and in sections 942 to 954. The provisions as to vacating and modifying this class of assessments are contained in title 3 of said chapter, in sections 958 to 964. It is under the provisions of this title that the proceeding now before the Court is instituted.

In title 5 of this chapter (sections 1017 to 1054) are contained the provisions for compelling the collection and payment of taxes, assessments and water rates by the sale or rather leasing of the property assessed.

We give below in full as many of these provisions as it seems to us are involved in the present litigation.

Chapter 338 of the Laws of 1858, which originated the present system, is printed in full under the first subdivision of our first point and need not be repeated here.

As to the Board of Assessors.

Section 943.—"The mayor shall appoint five persons, who shall constitute the board of assessors. The salary of each member of said board shall be three thousand dollars a year. The said board shall be charged with the duty of making all assessments, other than those required by law to be confirmed by a court of record, for local improvements for which assessments may be legally imposed in any part of the City of New York as hereby constituted. The said board shall appoint a secretary and such clerks and subordinates as may be necessary, and shall fix their salaries, not exceeding in the aggregate the appropriation made for such purpose in the final estimate. The secretary, clerks and subordinates of the board of assessors, of the mayor, aldermen and commonalty of the city of New York, shall be and act as secretary, clerks and subordinates of the board of assessors herein provided for until and unless they shall be removed or superseded by the last-mentioned board of assessors."

As to the Board of Revision of Assessments.

Section 944.—"The comptroller, corporation counsel and president of the board of public improvements shall constitute the board of revision of assessments.

The said board, or a majority thereof, shall have and perform all the powers and duties relative to the revision, correction and confirmation of assessments specified in the various laws and ordinances relating to assessments in any part of the City of New York, as hereby constituted, other than assessments made by commissioners appointed by a court of record, and other than those confirmed by the board of assessors; said board shall have power to consider, on the merits, all objections made to any such assessment, and to subpœna and examine witnesses in relation thereto, and to confirm said assessment, or to refer the same back to the board of assessors for revisal and correction in such respects as it may determine. The revision of such assessments shall be made without delay, so that unless the same are referred back for revisal and correction they shall be confirmed within thirty days from the time they shall, respectively, be presented for confirmation, and if not so confirmed or referred back they shall be deemed to be confirmed at the expiration of thirty days from the time they shall be, respectively, so presented for confirmation. All such assessments, immediately upon confirmation, shall be transmitted to the comptroller for entry and collection."

CERTIFICATES ON WHICH ASSESSMENTS ARE MADE.

Section 946.—"All assessments shall be made by the board of assessors on the following certificates, to wit:

1. "The officer or head of the board or department charged with the execution of the work in question shall certify to the board of assessors the total amount of all the expenses which shall have been actually incurred by The City of New York on account thereof.

2. "The comptroller shall certify to the board of assessors the amount of the interest, at the legal rate,

upon the several instalments advanced or payments made on account of such work, from the time of such payment or advance by the city to a day sixty days after the date of such certificate. Thereafter the board of assessors shall assess upon the property benefited, in the manner authorized by law, the aggregate amount of such certificate, or such proportion thereof as is authorized by law, and the said board shall not in any way be enjoined, restrained, hindered or delayed in the performance of this duty, provided that nothing contained in this section shall be construed to affect the powers of the board of revision of assessments."

Limitations on Powers of Courts to Vacate Assessments.

Section 958.—"No suit or action in the nature of a bill in equity or otherwise shall be commenced for the vacation of any assessment in said city, or to remove a cloud upon title; but owners of property shall be confined to their remedies in such cases to the proceedings under this title."

Petitions to Vacate Assessments Under Special Statutes.

Section 959.—"If in the proceedings relative to any assessment or assessments for local improvements, or in the proceedings to collect the same, any fraud or substantial error shall be alleged to have been committed, the party aggrieved thereby may apply to a justice of the supreme court in special term or in vacation, who shall thereupon, upon due notice to the corporation counsel, proceed forthwith to hear the proofs and allegations of the parties. If, upon such hearing, it shall appear that the alleged fraud or substantial error, other than such errors as are specified in the next section has been committed as provided in this title, the said assessment shall be vacated or modified,

and the lien created thereby, or by any subsequent proceedings, shall cease. If, upon such hearing, it shall appear that, by reason of any alleged irregularity, the expense of any local improvement has been unlawfully increased, the judge may order that such assessment upon the lands of said aggrieved party be modified by deducting therefrom such sum, as is in the same proportion to such assessment as is the whole amount of such unlawful increase to the whole amount of the expense of such local improvement. Any order that may be made by a justice under authority of this section shall be filed in the office of the County Clerk of the county in which the lands are situated, and after the filing of a certified copy thereof with the officer having charge of the assessment, it shall be his duty to cancel or reduce the assessment as required by the order, or do any other act required thereby."

Assessments Not to be Set Aside for Certain Technicalities.

Section 960.—"No assessment heretofore made or imposed, or which shall hereafter be made or imposed for any local improvement or other public work, already completed or now being made or performed, or which shall hereafter be made, done, or performed, shall hereafter be vacated or set aside for or by reason of any omission to advertise, or irregularity in advertising any ordinance, resolution, notice, or other proceeding relative to, or authorizing the improvement or work for which such assessment shall have been made or imposed, or for proposals to do the work, or for or by reason of the omission of any officer to perform any duty imposed upon him, or for or by reason of any defect in the authority of any department or officer upon whose action the assessment shall be in any manner or to any extent dependent, or for or by reason of any omission to comply with or carry out any detail

of any law or ordinance, or for or by reason of any irregularity or technicality, except only in cases in which fraud shall be shown and in case of an assessment for repaving any street or public place upon property for which an assessment has once been paid for paving the same street or public place; and all property in said city benefited by any improvement or other public work already completed, or now being made or performed, and hereafter made, done, or performed, except as aforesaid, shall be liable to assessment for such improvement or work, and all assessments for any such improvement or other public work shall be valid and binding notwithstanding any such omission, irregularity, defect in authority, or technicality. No assessment shall be vacated by reason of fraud or irregularity in the proceedings to collect the same by sale of the assessed premises; but, upon proof of such fraud or irregularity, such sale shall be set aside and the respective rights and liabilities of the assessed person and of The City of New York shall become and be the same as if such sale had not been made."

POWER OF COURT TO VACATE OR REDUCE ASSESSMENTS LIMITED.

Section 962.—"No court shall vacate or reduce any assessment in fact or apparent, whether void or voidable, on any property for any local improvement, otherwise than to reduce any such assessment to the extent that the same may be shown by parties complaining thereof to have been in fact increased in dollars and cents by reason of fraud or substantial error; and in no event shall that proportion of any such assessment, which is equivalent to the fair value or fair cost of any actual local improvement, with interest at the rate of three per centum per annum from the date of confirmation to the date of the final order of reduction, and seven per centum thereafter, be dis-

turbed for any cause. The provisions of this section shall apply to actions to recover money paid for assessments, and the amount recovered shall be limited to the excess over the fair value or fair cost of the improvement."

STATUTE OF LIMITATIONS.

Section 963.—"All proceedings to vacate or reduce assessments in the City of New York must be brought within one year after the confirmation thereof."

TAXES, ASSESSMENTS AND WATER RENTS TO BE LIENS.

Section 1017.—"All taxes and all assessments for local improvements, and all water rents, and the interest and charges thereon, which may, in the City of New York, as by this act constituted, hereafter be laid or may have heretofore been laid, upon any real estate now in said city, shall continue to be, until paid, a lien thereon, and shall be preferred in payment to all other charges. No assessments for any local improvement shall be deemed to be fully confirmed, so as to be due and be a lien upon the property included in the assessment, until the title thereof, with the date of confirmation shall be entered with the date of such entry, in a record of the titles of assessments confirmed, to be kept in the office of the collector of assessments and arrears."

NOTICE OF CONFIRMATION OF ASSESSMENTS TO BE PUBLISHED.

Section 1018.—"It shall be the duty of the comptroller to give public notice, by advertisement, for at least ten days, in the 'City Record' and the corporation newspapers, duly designated for any borough in which the property is situated, immediately after the confirmation of any assessment for a local improvement, that the same has been confirmed, specifying the

title of such assessment, and the date of its confirmation, and also the date of entry in the record of titles of assessments kept in the office for the collection of assessments and arrears of taxes and assessments, and of water rents, notifying all persons, owners of property affected by any such assessments, that unless the amount assessed for benefit on any person or property shall be paid within sixty days after the date of said entry of any such assessment, interest shall be thereafter collected thereon as provided in the following section; and all provisions of law or ordinance requiring any different or other notice of assessments and interest thereon, are hereby repealed."

INTEREST TO BE CHARGED.

Section 1019.—"If any such assessment shall remain unpaid for the period of sixty days after the date of entry thereof on the said record of titles of assessments, it shall be the duty of the officer authorized to collect and receive the amount of such assessments to charge, collect and receive interest thereon, at the rate of seven per centum per annum, to be calculated from the date of such entry to the date of payment."

RATE OF INTEREST.

Section 1020.—"Interest shall hereafter be charged and collected at the rate of seven per centum per annum on all arrears of taxes and assessments returned to the collector of assessments and arrears from the time they become due until the date of payment, or in case a sale has taken place, as provided in section ten hundred and twenty-seven, until the date of the certificate mentioned in said section, and on the rents and charges for water from the time the taxes become due, to which they may be added as required by section ten hundred and twenty-five, until the same date respectively."

Sales of Lands for Non-payment of Taxes and Assessments—Procedure.

Section 1027.—" Whenever any tax on lands or tenements, or any assessment on lands or tenements for local improvements shall remain unpaid for the term of three years from the time the same shall have been confirmed, and also whenever any rents for water in said city shall have been due and unpaid for the term of four years from the time the same shall have been due, it shall and may be lawful, for the collector of assessments and arrears under the direction of the comptroller to advertise the said lands and tenements or any of them for sale, and by such advertisement the owner or owners of such lands and tenements respectively shall be required to pay the amount of such tax, assessment or water rents so remaining unpaid, together with the interest thereon at the rate of seven per centum per annum to the time of payment, with the charges of such notice and advertisement, to the said collector, and notice shall be given by such advertisement that if default shall be made in such payment, such lands and tenements will be sold at public auction at a day and place therein to be specified, for the lowest term of years at which any person or persons shall offer to take the same in consideration of advancing the said tax, assessment or water rents, as the case may be, and the interest thereon as aforesaid to the time of sale, and the charges of the above-mentioned notices and advertisement and all other costs and charges accrued thereon; and if, notwithstanding such notice, the owner or owners shall refuse or neglect to pay such tax, assessment or water rents, with the interests as aforesaid, and the charges attending such notice and advertisement, then it shall and may be lawful for the said collector, under the direction of the said comptroller, to cause such lands and tenements to be sold at public auction for a term of years, for the purpose and in

the manner expressed in the said advertisement, and such sale shall be made on the day and at the place for that purpose mentioned in the said advertisement, and shall be continued from time to time, if necessary, until all the lands and tenements so advertised shall be sold; and the said collector shall give to the purchaser or purchasers of any such lands or tenements a certificate of sale in writing, describing the lands and tenements so purchased, the term of years for which the same shall have been sold, the sum paid therefor, and the time when the purchaser will be entitled to a lease of the said lands and tenements. But no houses or lots, or improved or unimproved lands, in the City of New York, shall be hereafter sold or leased at public auction for the non-payment of any tax, assessment or water rents which may be due thereon, unless notice of such sale shall have been published once in each week successively for three months in the *City Record* and the corporation newspapers, which advertisement shall contain, appended to said notice, a particular and detailed statement of the property to be sold for taxes, assessments or water rents; or the said detailed statement and description, instead of being published in the *City Record* and the corporation newspapers, shall, at the option of the said comptroller, be printed in a pamphlet, in which case copies of the pamphlet shall be deposited in the office of the said collector, and shall be delivered to any person applying therefor. And the notice provided for in this section to be given of the sale of houses and lots and improved and unimproved lands shall also state that the detailed statement of the taxes, assessments, or water rents, and the ownership of the property taxes assessed, and on which the water rents are unpaid, is published in the *City Record* and the corporation newspapers, or in a pamphlet, as the case may be, and that copies of the pamphlet are deposited in the office of the said collector, and will be delivered to any person

applying for the same. No other notice or demand of the tax assessment or water rent shall be required to authorize the sale of any lands and tenements as hereinbefore provided."

REDEMPTION LEASE TO BE EXECUTED TO PURCHASER.

Section 1041.—"The collector of assessments and arrears, under direction of the comptroller of the city, shall cause an advertisement to be published at least twice in each week for six weeks successively in the 'City Record' and the corporation newspapers, in such form as he shall deem best calculated to give notice of such sale, that unless the lands and tenements sold be redeemed by a certain day, they will be conveyed to the puchaser. If the person or persons claiming title to the said lands and tenements, or some other persons, shall not, within two year sfrom the date of the beforementioned certificate pay to the said collector, for the use of the purchaser or purchasers, his, her, or their heirs, executors, administrators, or assigns, the sum mentioned in such certificate, together with the interest thereon, at the rate of fourteen per centum per annum, from the date of such certificate, the said comptroller in the name of the City of New York, at the expiration of the said two years, shall execute to the purchaser or purchasers, his, her, or their heirs, executors, administrators, or assigns, a lease under the common seal of the city, of the lands and tenements so sold for such term of years as the same shall have been sold, and the execution thereof shall be witnessed by the said collector. At the time of receiving the lease the purchaser shall pay the sum of two dollars and fifty cents to the said collector for the expense of drawing said lease, and also the expense of advertising the notice to redeem; and all such leases executed by the said comptroller and witnessed by the said collector shall be presumptive evidence that the sale

and all proceedings prior thereto, from and including the assessments on said lands and tenements, for taxes or assessments or water rents, and all notices required by law to be given previous to the expiration of the two years allowed to redeem, were regular and according to the provisions of the statute in such cases made and provided; and such purchaser or purchasers, his, her or their heirs, executors, administrators, or assigns, shall, in virtue thereof and of this title, lawfully hold and enjoy the said lands and tenements in said lease mentioned for his, her, or their own proper use against the owner or owners thereof, and all claiming under him, her, or them, until such purchaser's term therein shall be fully complete and ended; and the said purchaser or purchasers, his, her, or their heirs, executors, administrators, or assigns, shall be at liberty to remove all the buildings, or materials which he, she, or they shall erect or place thereon during the said term, within one month after the expiration of the said term, but leaving the lands and tenements, with the streets fronting the same in the order required by the regulations of the municipal assembly; provided that such lease shall not be executed and delivered until the expiration of six months after the publication of the notice last herein above mentioned."